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VIVIANE REDING
VICE-PRESIDENT OF THE EUROPEAN COMMISSION
JUSTICE, FUNDAMENTAL RIGHTS AND CITIZENSHIP

LÁSZLÓ ANDOR
MEMBER OF THE EUROPEAN COMMISSION
EMPLOYMENT, SOCIAL AFFAIRS AND INCLUSION

CECILIA MALMSTRÖM
MEMBER OF THE EUROPEAN COMMISSION
HOME AFFAIRS

Brussels, 24 MAI 2013
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Dear Minister Shatter,

Thank you very much for having provided us with a copy of your reply of 30 April to the letter of 23 April 2013 on free movement of EU citizens sent to you by the Federal Minister of the Interior of Austria, the Federal Minister of the Interior of Germany, the Minister for Immigration of the Netherlands and the Secretary of State for the Home Department of the United Kingdom in view of the Justice and Home Affairs Council of 6-7 June 2013.

In view of the forthcoming discussion on this matter in the Council, we would like to provide you with the factual and legal elements which are part of the Commission's assessment regarding free movement rights. In particular, we would like to briefly illustrate what is or is not permitted under EU law. We would also like to suggest the best way forward to assist Member States to improve practical implementation on the ground and to ensure that citizens fully benefit from the free movement rights enshrined in the Treaty and in the Charter of Fundamental Rights.

As rightly stressed by the four Ministers, the right to freedom of movement in the European Union is one of the central achievements of European integration.

For the Commission, it is a cornerstone of the European Union, an enormous enrichment of citizens' personal freedom and of our societies and one of the EU rights that citizens cherish most. It is therefore of utmost importance that this right is strongly upheld by all the European institutions.

Furthermore, there is a strong economic case for free movement, which is particularly relevant in our current economic context. In our economic and demographic situation, increased intra-EU mobility, which is still far lower than mobility in the United States, is a labour market asset. The recent experience of the 2004 and 2007 enlargements has shown that intra-EU mobility has positive effects on economies and labour markets. For instance, the GDP of the EU-15 Member States that formed part of the EU before 1 May 2004 is estimated to have increased by almost 1% in the long term as a result of post-enlargement mobility in 2004-2009.

Mr Alan Shatter, Minister for Justice, Equality and Defence
Presidency of the Council

Against this background, it is important to base our discussion in the Council on a solid analysis in order to allow a well informed discussion on 7 June, based on facts, and ensure a useful follow-up. To this end, and also in view of the strong public interest in this matter, we would find it necessary that Member States provide the relevant facts and figures, including statistical evidence, to clarify the nature and scope of the problems that the Ministers are referring to in general terms in their above-mentioned letter.

In order to help the debate take place in a forward looking spirit, we attach an overview of key legal principles regarding EU rules on free movement, including guidance on fighting abuse of these rules, which has already been given to all Member States.

Following our debate on 7 June, the Commission will invite Member States to follow-up on the discussion and further analyse the concrete implementation of the free movement rules, including the guidance on fighting abuse of these rules, in the context of the free movement experts group (the FREEMO).

We are looking forward to a fruitful discussion under your Presidency.

Yours sincerely,

Viviane REDING *László ANDOR* *Cecilia MALMSTRÖM*

Copy : Ministers of the Interior, Ministers of Justice, Ministers for Employment and Social Affairs of the Member States

ANNEX

EU rules on free movement : Key legal principles

1. General considerations

The right to freedom of movement is one of the most cherished EU rights in our Treaties, a key feature of European citizenship, a pillar of the Single Market and a two-way street from which all Member States benefit.

Free movement is not limited to the movement of economically active EU citizens. EU workers have been benefitting from this freedom since the 1960s. But the Treaty of Maastricht extended the right to free movement to all EU citizens 20 years ago. Making use of free movement for other purposes than working and studying, such as for retiring in another Member State or for joining or accompanying one's family, is a core right attached to the status of Union Citizenship.

The right of EU citizens to move and settle within the EU, whether for economic or other purposes, is fundamentally different from the possibilities offered to non-EU nationals who are subject to immigration rules. There should be no ambiguity regarding this legal difference.

We are discussing two statuses and different sets of rights and, as the Heads of State and Government already underlined in Tampere in 1999, we should seek to approximate the rights of immigrants to those of EU citizens who exercise free movement, not the other way round.

2. EU rules regarding access to welfare benefits

The EU's 2004 Free Movement Directive[1], sets out the citizens' rights to move and settle within the EU and also the citizens' obligations. It provides for limits and safeguards which ensure that free movement is a fair scheme which rewards contribution to the host societies and integration of EU citizens and ensures that free movement rights are not abused.

Concerning access to welfare benefits, EU law[2] foresees that EU citizens who are workers and self-employed in another Member State are entitled to the same social security benefits and social assistance benefits as nationals because they contribute, like all other national workers, through their contributions and taxes to the public funds from which the benefits are financed. Logically, it is up to Member States to verify whether a professional activity is actually carried out or simply claimed, and whether the workers or self-employed fulfil the obligations under national law regarding paying contributions and taxes.

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1 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

2 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; Regulation 883/2004 on the coordination of social security systems; Regulation 492/2011 on freedom of movement for workers within the Union.

Access to social security benefits (e.g. sickness, maternity, unemployment) cannot be restricted compared to nationals[3]*. However, non-active EU citizens can claim social security benefits in a Member State only if they pass a strict 'habitual residence test', proving that they have a genuine link with the Member State in question. Member States agreed to strict criteria for assessing habitual residence. It is also for Member States to verify whether these criteria are fulfilled.*

Finally, social assistance benefits (such as minimum subsistence income) may be refused to non-active EU citizens during the initial three months stay in the host Member State. After that period, non-active EU citizens should in principle not be eligible for social assistance benefits since they would have to show resources higher than the income threshold under which such assistance is granted as a condition for residence.

It can happen that the situation of a non-active EU citizen who initially had sufficient resources changes with time and the citizen will have to rely on the social assistance benefits of the host Member State.

In such cases, Member States must show a certain degree of financial solidarity with EU citizens, but this solidarity is not unlimited. Where Member States have justified reasons to doubt that the situation of the EU citizen concerned could improve, they can check whether he/she has become an 'unreasonable burden' to their social assistance system and decide to terminate his/her right of residence (and ask the citizen to leave), provided necessary safeguards are complied with (e.g. individual assessment taking into consideration the personal circumstances of the case, procedural safeguards, specific case of permanent residents).

3. *Prevention of abuse*

EU citizens can be expelled not only on grounds of public policy or public security but also in the event of abuse or fraud.

Exclusion orders can also be imposed in grave cases where it is shown that an EU citizen is reasonably likely to continue to be a serious threat to public policy. Abuses (such as so-called "marriages of convenience") or fraud (such as document forgery) can be covered by the public policy derogation and may justify in individual cases imposing an exclusion order.

It is therefore not accurate to say that EU law does not allow for exclusion orders in case of document forgery. Rather, the Directive explicitly allows that national law may provide for sanctions in case of abuses or fraud. What the Directive does, however, not allow are general prevention measures, such as expulsions and exclusion orders for all persons in a given situation without having regard to proportionality, individual circumstances and the gravity of the offense.

The Commission works for a full and correct implementation of EU law. The Commission is ready to look into all facts on systematic abuse Member States may want to put on the table, backed by statistical evidence of their nature and scope and work together with Member States to address any such systemic issues which Member States on their own cannot address properly.

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[3] Regulation 883/2004/EC.

At the same time, although there have been long standing claims by some Member States' representatives of systematic abuse through "marriage of convenience", little substantiated evidence of these claims has been presented. Equally, on the so-called "benefits tourism", Member States, so far, have not provided any facts which would allow concluding that there is a systemic problem with the rules of free movement in place.

4. *Enforcement of EU free movement rules*

The Commission is pursuing a rigorous enforcement policy aimed at ensuring the full and effective transposition of Directive 2004/38/EC by all Member States, as illustrated in the Commission Report under Article 25 TFEU – On progress towards effective EU Citizenship 2011-2013 of 8 May 2013.[4]

The Commission has been supporting Member States in implementing EU law, particularly by issuing, in 2009, specific Guidelines which provide for a definition of 'abuse and fraud' and an illustration of what kind of measures Member States are allowed to take under EU law. On this basis, further work together with the Member States has also been carried out with a view to producing a Handbook on tackling "marriages of convenience". An initial provisional draft of this handbook was sent to the Irish Presidency and the Chair of the LIBE Committee of the European Parliament on 27 March 2013. The Commission is currently waiting for comments on this draft.

The Commission is ready to work further and look into sharing best national practices, for example in terms of facilitating exchanges on best national implementation practices of the free movement rules.

5. *Social security issues*

Regarding more specifically social security issues, a discussion has already been launched in the framework of the Administrative Commission on social security coordination and the Commission agrees that it should continue there. The Commission expects that its findings will be published at the end of 2013 together with a practical Guide to assist in the implementation of EU law.

6. *Social inclusion*

Integration of EU citizens, promoting social inclusion and combating poverty has been among the priorities of the European Social Fund in the 2007-2013 programming period. Member States have allocated 17.7% of their ESF budget on this priority. Programmes included for example language training, vocational training, labour market integration measures, including job search assistance etc.

Social inclusion should remain a key priority for ESF in the future. Promoting employment, increasing educational attainments and social inclusion are three of the five main objectives of the Europe 2020 Strategy. This has justified the Commission's proposal to allocate at least 25% of cohesion policy resources on investment into people and employment and social reforms through the European Social Fund. It is important that at least 20% of that amount is allocated to combating poverty and social inclusion in the next programming period.

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[4] COM (2013) 270, page 4.